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9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**

11 TALECE INC., a corporation,
12

13 Plaintiff,

14 v.

15 ZHENG ZHANG, an individual; and
16 DOES 1 through 10, inclusive,

17 Defendants.

Case No.: 5:20-cv-03579-BLF

**OPPOSITION TO PLAINTIFF’S MOTION
TO REMAND DATED JULY 13, 2020 (ECF
17); OBJECTIONS TO EVIDENCE; AND
REQUEST FOR ATTORNEY FEES AND
COSTS**

The Honorable Beth Labson Freeman
Courtroom 3
Date: October 15, 2020
Time: 9:00 a.m.

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20 **ISSUE TO BE DECIDED**

21 **(28 U.S.C. §1332(a)(2))**

22 Does diversity jurisdiction exist between (1) a corporation domiciled in the State of
23 California and (2) a citizen of China, who *could* apply for a permanent residence, but *has not*
24 *taken any steps whatsoever toward applying for (and thus does not have)* a permanent
25 residence status?
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1 visa.¹ Third, Plaintiff claims to have personally served Defendant Zhang on May 27, 2020.
2 One day later, on May 28, 2020, Defendant Zhang filed his notice of removal.

3 Defendant Zhang thus properly removed this case.

4 **II. PLAINTIFF MISCONSTRUED 28 U.S.C. § 1332(a)(2) IN MOVING TO** 5 **REMAND**

6 In its Motion to Remand (ECF 17), Plaintiff concedes the following points:

- 7 ✓ “Plaintiff Talece is a . . . citizen of the State of California,” Motion to Remand;
8 ECF 17, at page 2, lines 19-20;
- 9 ✓ “Mr. Zhang is a citizen of the People’s Republic of China,” *id.*, line 20;
- 10 ✓ “Plaintiff acknowledges that its complaint meets the threshold amount in
11 controversy of over \$75,000 in damages, *id.*, at page 3, lines 2-31; and
- 12 ✓ “Mr. Zhang did so timely remove this case to federal court.” *Id.*, at page 2,
line 26.

13 Instead, Plaintiff argues that diversity jurisdiction is lacking because Defendant Zhang
14 has applied for permanent residence status. *Id.*, at page 2, lines 22-24. Plaintiff’s argument is
15 without merit for at least the following reasons.

16 ***a. Plaintiff’s argument lacks any evidentiary support and is contradicted by facts***

17 Defendant Zhang respectfully notes that Plaintiff’s counsel submits no declaration or
18 affidavit as to the factual contentions made in the Motion to Remand, except the attorney fee
19 portion.

20 Litigation is not a game and Plaintiff and its counsel should not put forth factual
21 contentions that lack evidentiary support—and are indeed contradicted by facts. This runs
22 afoul of Rule 11(b)(3), which requires that Plaintiff assert “factual contentions [that] have
evidentiary support.”

23 Further, throughout this litigation, Plaintiff has been making factual contentions
24 without any declaration or affidavit, running afoul of N.D. Cal. Civil Local Rules 7-3(a) and

25 ¹ An H-1B visa allows a foreign worker to be ***temporarily*** employed by an employer in the United States
26 ***for a limited time period*** for a job that requires the application of highly specialized knowledge and at least
27 a bachelor’s degree. *Working in the United States: H-1B Fiscal Year (FY) 2021 Cap Season*, U.S.
28 Citizenship And Immigration Serv. <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-fiscal-year-fy-2021-cap-season> (last visited July 21, 2020).

1 7-5(a), which require “[f]actual contentions made in support of ... any motion ... be supported
2 by an affidavit or declaration.”

3 Here, contrary to Plaintiff’s baseless contentions, Defendant Zhang had been an
4 international student from 2014 to 2019. *Declaration of Zheng Zhang* (“Zhang Decl.”), at 5.
5 Defendant Zhang changed to his temporary worker status only in October, 2019. *Id.*, at 6.
6 Defendant Zhang has never applied for permanent residence and concurrently do not intent to
do so. *Id.*, at 7-8.

7 Thus, premised entirely how Defendant Zhang has supposedly taken significant steps
8 toward obtaining permanent residence, Plaintiff’s Motion to Remand must be denied.

9 ***b. Citizenship is determined at the time this case was filed***

10 Under the “time-of-filing” rule, the satisfaction of the 28 U.S.C. § 1332(a) diversity
11 requirements (amount in controversy and citizenship) are determined ***on the date the suit is***
12 ***filed***. *Wolde-Meskel v. Vocational Instruction Project Cmty. Serv., Inc.*, 166 F.3d 59, 62 (2d
13 Cir. 1999); see also *Mollan v. Torrance*, 22 U.S. 537, 539 (1824); *Universal Licensing Corp.*
14 *v. Paola del Lungo S.p.A.*, 293 F.3d 579, 581 (2d Cir. 2002) (stating that diversity of
15 citizenship “must exist at the time the action is commenced”); *Cable media of Puerto Rico,*
16 *Inc. v. Carribean Broad. Network, LLC*, 581 F.Supp.2d 286, 287 (D. Puerto Rico 2008).

17 A party who has applied for, but has not yet obtained, permanent residence status at
18 the time the lawsuit is filed, is not considered a citizen for diversity jurisdiction purposes. *Foy*
19 *v. Schantz, Schantzman & Aaronson, P.A.*, 108 F.3d 1347, 1348-50 (11th Cir. 1997) (holding
20 that an Australian national in the United States on a temporary work visa who had applied for,
21 but had not yet received permanent residence status, at the time the lawsuit commenced was
not a citizen).

22 Here, at the time Plaintiff filed this action, Defendant Zhang was and continues to be
23 a citizen of China with a temporary working H-1B visa authorizing Defendant Zhang to work
for his employer headquartered in the state of Pennsylvania.

24 The case of *PW W. Coast LLC v. Monteverde*, 2018 WL 1795486 (S.D. Fla. Feb. 13,
25 2018) mirrors Plaintiff’s present allegations and is thus instructive.

26 In *PW W. Coast LLC*, the defendants challenge the court’s diversity jurisdiction,
27 arguing that diversity is destroyed because the Argentinian citizen plaintiff was domiciled in
28 Florida since he resided there. *See id.* at *3. The defendants did not dispute plaintiff’s

1 representation that he is an Argentinian citizen and not a U.S. citizen or a legal permanent
2 resident. *Id.* The defendants' court documents alleged the Argentinian plaintiff attempted to
3 obtain a visa, which supported the plaintiff's contention that he is not and was not a legal
4 permanent resident or U.S. citizen when the lawsuit was filed. *Id.* The court determined it had
5 diversity jurisdiction over the matter because the defendants did not dispute the Argentinian
6 plaintiff's legal argument that diversity jurisdiction exists under 28 U.S.C. § 1332(a)(2) and
based on that statute's express language. *See id.*

7 Likewise, here, Plaintiff has challenged the court's diversity jurisdiction arguing that
8 Chinese citizen Defendant Zhang is domiciled in California because he resides there.
9 Plaintiff's Motion to Remand does not dispute Defendant Zhang is a citizen of China and is
10 neither a U.S. citizen nor a lawful permanent resident of the United States. Moreover, Plaintiff
11 claims that Defendant Zhang is attempting to obtain permanent residence status, effectively
12 conceding that Defendant Zhang is still not, and was not, a lawful permanent resident when
this lawsuit was filed.

13 In sum, because Plaintiff concedes that Defendant Zhang was not a lawful permanent
14 resident *when this lawsuit was filed*, diversity jurisdiction exists in this case.

15 ***c. Having a temporary worker visa status does not affect diversity jurisdiction***

16 Diversity jurisdiction may lack when a citizen of a foreign state has already been
17 "lawfully ***admitted for permanent residence*** in the United States and are domiciled in the
18 same State." 28 U.S.C § 1332(a)(2) (2011) (emphasis added).

19 But, for the purpose of assessing diversity jurisdiction, "only an alien who has
20 ***established*** legal permanent residence in the United States may be considered to be a 'citizen'
21 of an American state." *PW W. Coast LLC*, at *2. Foreign nationals not admitted to the United
22 States as permanent residents "are ***not 'citizens'*** of their state of domicile, ***no matter how long***
23 ***there they live***. Thus, it is an individual's immigration status, not his or her contacts with the
United States, which determines 'citizenship' for diversity purposes." *Velazquez v. Broesche*,
24 2006 WL 2329401 at *1 (W.D.Tex. June 13, 2006).

25 More specifically to Defendant Zhang's non-immigrant temporary worker visa, an
26 alien "admitted into the United States on a *temporary, non-immigrant visa* is an alien for
27 purposes of citizenship." *S Rock Partners, LLC v. Kiselev*, 2018 WL 888725, at *4 (D.Conn.
28 Feb. 14, 2018) (citing *Kato v. County of Westchester*, 927 F.Supp.714, 715-17 (S.D.N.Y.

1 1996)). A person is “plainly an alien . . . because he is in the United States pursuant to a
2 *temporary, nonimmigrant visa.*” *Mor v. Royal Caribbean Cruises Ltd.*, 2012 WL 2333730 at
3 *2 (S.D.N.Y. June 19, 2012).

4 Here, Defendant Zhang was on a ***non-immigrant*** student visa and is now on a ***non-***
5 ***immigrant*** temporary worker visa. Defendant Zhang has not even applied for permanent
6 residency. *Zhang Decl.*, at 8. Defendant Zhang cannot possibly have been admitted as a
7 permanent resident if he has not even applied.

8 ***d. Having the possibility of becoming a permanent resident does not affect diversity***
9 ***jurisdiction***

10 Further, in its Motion to Remand, Plaintiff proposes a “could become” test and
11 suggests that having the *mere possibility* of becoming a permanent resident destroys diversity
12 jurisdiction. This argument finds no support in law and would lead to absurd results.

13 First, as shown above, Plaintiff’s proposed “could become” test contradicts the express
14 language of the removal statute, 28 U.S.C § 1332(a)(2) (2011), which requires that the alien
15 must have been ***admitted*** as—not, could possibly become—a permanent resident.

16 Second, Plaintiff’s proposed “could become” test would lead to absurd results. For
17 example, because all corporate officers (the CEO, the CTO, and the Head of Engineering) of
18 Plaintiff corporation have already resigned (because they do not agree with the bossy,
19 dishonest management style insisted on by Plaintiff’s majority shareholder, Mr. Ming Zhang,
20 as outlined in Defendant Zhang’s Motion to Dismiss; ECF 9), Plaintiff corporation is now
21 dysfunctional and conducts no real business other than exerting personal revenge on
22 Defendant Zhang by prosecuting this lawsuit and defending multiple breaches of contract
23 lawsuits against for refusing to perform its contractual obligations owed to its customers.

24 Plaintiff corporation thus “could become” a foreign corporation by relocating to the
25 state of New York, to which Mr. Ming Zhang is believed to have closer personal and business
26 ties. *Zhang Decl.*, at 9. Based on Plaintiff’s proposed “could become” test, this possible
27 relocation would confer diversity jurisdiction, regardless Defendant Zhang is a citizen of
28 China or a citizen of California.

29 In the same vein, Plaintiff corporation “could become” a foreign corporation by
30 converting itself into a China company, because Mr. Ming Zhang resides and is domiciled in
31 China; Mr. Ming Zhang speaks little English and thus has neither intention, nor competency

1 to conduct business in the United States. *Zhang Decl.*, at 10. Based on Plaintiff’s proposed
2 “could become” test, this possible corporate conversion would confer diversity jurisdiction,
3 even if Defendant Zhang is deemed a citizen of California, as argued by Plaintiff in its Motion
4 to Remand.

5 In sum, the removal statute expressly states that a foreign citizen must have been
6 **admitted** as a permanent resident of the United States in order for diversity to be lacking,
7 Plaintiff’s mere speculation that Defendant Zhang could become a permanent resident at some
8 point in the future is not a valid basis for remand.

9 ***e. The Citizenship of foreign citizen is established by Green Card status, not residency***

10 It is well-settled that allegations of residency alone cannot establish an individual’s
11 citizenship. *Ming Li v. Colonial BT, LLC*, 2014 WL 3579469, at *4 (D.Conn. July 21, 2014)
12 (citing *Canedy v. Liberty Mut. Ins. Co.*, 126 F.3d 100, 102-03 (2d Cir. 1997)).

13 As the Ninth Circuit stated: “the diversity jurisdiction statute, 28 U.S.C. §1332, speaks
14 of citizenship, *not* of residency.” *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir.
15 2001) (emphasis added); *see also Yamoaka v. Bomex USA, Inc.*, 2014 WL 12616397, at *1
16 (C.D.Cal. Aug. 22, 2014).

17 In other words, for diversity purposes an individual’s citizenship is determined by his
18 domicile—not his residence. *Ming Li v. Colonial BT, LLC*, 2014 WL 3579469, at *4.

19 In this case, Defendant Zhang is a China national. *Zhang Decl.*, at 4. He is in the U.S.
20 pursuant to a temporary worker H-1B visa. *Id.*, at 7. Thus, for the purpose of assessing
21 diversity jurisdiction, Defendant Zhang is a citizen of a foreign state (China), not a citizen of
22 California.

23 **III. FEDERAL QUESTION JURISDCITON ALSO EXISTIS IN THIS**
24 **CASE**

25 In addition to diversity jurisdiction, the second independent basis for removal is a
26 federal immigration law question arising under the Immigration and Nationality Act, Title 8
27 of the United States Code: whether any of Defendant Zhang’s alleged conducts violates the
28 federal immigration law.

More specifically, in the Complaint, Plaintiff alleges as follows:

Plaintiff is informed and believes and thereon alleges that ***Defendant
Zheng Zhang caused Plaintiff Talece to engage in transactions in such a***

1 *way that violated Immigration and Nationality Act* and certain Federal and
2 California regulations related to employment taxes, subjecting Plaintiff
3 Talece to potential liability.

4 (Complaint, at 18)

5 Based on these allegations, Plaintiff claims that Defendant Zhang breached his
6 fiduciary duty to Plaintiff corporation. *See* Plaintiff’s Complaint, the first cause of action.

7 By asserting that Defendant Zhang has engaged in conducts that violated the
8 Immigration and Nationality Act, Plaintiff specifically invoked the Title 8 of the United States
9 Code and presents a federal immigration law question, namely, whether any of Defendant
10 Zhang’s conducts violates the federal immigration law.

11 Federal courts have *exclusive* subject matter jurisdiction over lawsuits involving the
12 immigration laws, like this one. Further, the principle of federal preemption prevents a state
13 court from deciding federal immigration law issues like the one Plaintiff raised.

14 **IV. THIS COURT SHOULD AWARD ATTORNEY’S FEES AND COSTS** 15 **TO DEFENDANT ZHANG**

16 The U.S. Supreme Court held that, under 28 U.S.C. § 1447(c), attorney’s fees and
17 costs may be awarded “on a showing that the unsuccessful party’s position was frivolous,
18 unreasonable, or without foundation.” *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 133
19 (2005).

20 Further, under 28 U.S.C. §1927 (entitled “Counsel’s liability for excessive costs”), an
21 attorney “who so multiplies the proceedings in any case unreasonably and vexatiously may
22 be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees
23 reasonably incurred because of such conduct.” *See also Hardy v. Cal.*, 2006 WL 932361, at
24 *1 (N.D.Cal. April 11, 2006).

25 Here, Plaintiff’s position that this court lacks diversity jurisdiction is frivolous,
26 unreasonable, and without foundation. First, as outlined in the attached Objection to Evidence,
27 Plaintiff bases its entire Motion to Remand on *unsworn, hearsay* statements that Defendant
28 Zhang somehow has applied for permanent residency—when defendant Zhang clearly has
not. Plaintiff’s company representative fails to provide any declaration attesting to the
supposed accuracy of these statements. Plaintiff’s counsel also fails to provide any declaration
to support these factual contentions. Neither Plaintiff’s company representative, nor Plaintiff’s

1 counsel provided declarations, because they know these are false contentions and are
2 contradicted by facts.

3 Second, throughout this litigation, Plaintiff has always resorted to *unsworn, hearsay*
4 statements in its motion papers (ironically, except for asking for attorney fees for fling this
5 baseless Motion to Remand). *See* ECF 11, Plaintiff's opposition to motion to dismiss; and
6 ECF 12, Plaintiff's reply and objection to evidence.

7 Therefore, this Court should award attorney's fees and costs to Defendant Zhang for
8 opposing this frivolous Motion to Remand.

9 CONCLUSION

10 For reasons explained above, given Plaintiff has acknowledged Defendant Zhang met
11 all the elements required for proper removal and Defendant Zhang is not a citizen of the State
12 of California, diversity jurisdiction is proper; Plaintiff's motion to remand should be denied;
13 and attorney fees and costs should be awarded to Defendant Zhang.

14 Dated: July 27, 2020

Respectfully submitted,

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16 By

17 Zheng "Andy" Liu (SBN 279327)
18 *Attorney for Defendant*
19 *Zheng Zhang*
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9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**

11 TALECE INC., a corporation,
12

13 Plaintiff,

14 v.

15 ZHENG ZHANG, an individual; and
16 DOES 1 through 10, inclusive,

17 Defendants.
18

Case No.: 5:20-cv-03579-BLF

OBJECTION TO EVIDENCE

19
20 Defendant Zhang hereby objects to portions of the evidence filed in support of
21 Plaintiff Talece Inc.’s Motion to Remand.

22 Defendant Zhang respectfully requests that the Court strikes the objectionable and
23 speculative portions of the evidence as specifically set forth below
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**OBJECTIONS TO EVIDENCE IN
PLAINTIFF'S MOTION TO REMAND**

<i>Inadmissible Evidence</i>	<i>Content of the Inadmissible Evidence</i>	<i>Grounds for Evidentiary Objection</i>
Plaintiff Talece's Notice of Motion and Motion to Remand, at page 2, lines 20-24.	"Mr. Zhang is a citizen of the People's Republic of China, and currently residing and working in the State of California on an H-1B working status granted by U.S. Department of Homeland Security. Mr. Zhang is in the process of obtaining his green card for permanent resident."	Lack of personal knowledge Plaintiff's counsel has no personal knowledge of Mr. Zhang's immigration status, including the state for which Mr. Zhang's H-1B visa is in and Mr. Zhang's intention, rather lack thereof, to apply for permanent residence.
Plaintiff Talece's Notice of Motion and Motion to Remand, at page 5, lines 14-15.	"As of now, Mr. Zhang is under an H-1B working status in the State of California and has applied for his permanent residence via employment, with the process still ongoing."	Lack of personal knowledge Plaintiff's counsel has no personal knowledge of Mr. Zhang's immigration status, including the state for which Mr. Zhang's H-1B visa is in and Mr. Zhang's intention, rather lack thereof, to apply for permanent residence.
Plaintiff Talece's Notice of Motion and Motion to	"Mr. Zhang founded his company BuildSimHub Inc.	Misstates Evidence Exhibit B2. of Plaintiff's

Remand, at page 5, lines 17-19.	(EXHIBIT B) in November 2016. . . .”	Notice of Motion and Motion to Remand does not show “Mr. Zhang founded his company BuildSimHub Inc.”
Plaintiff Talece’s Notice of Motion and Motion to Remand, at page 5, lines 18-19.	“[Mr. Zhang] has had full-time employment in the U.S. for at least three years.”	Lack of personal knowledge Plaintiff’s counsel has no personal knowledge of Mr. Zhang’s current nor past immigration status, including the state for which Mr. Zhang’s H-1B visa is in.
Plaintiff Talece’s Notice of Motion and Motion to Remand, at page 6, lines 20-21.	“From November 2016 to the present day, [Mr. Zhang] is the CEO, CFO and Secretary of BuildSimHub. . . .”	Misstates Evidence Exhibit B2. of Plaintiff’s Notice of Motion and Motion to Remand does not show “[f]rom November 2016 to the present day, [Mr. Zhang] is the CEO, CFO and Secretary of BuildSimHub. . . .” Lack of personal knowledge Plaintiff’s counsel has no personal knowledge

		whether “[f]rom November 2016 to the present day, [Mr. Zhang] is the CEO, CFO and Secretary of BuildSimHub. . . .”
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Respectfully submitted,

By Zheng “Andy” Liu (SBN 279327)
Attorney for Defendant
Zheng Zhang

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

TALECE INC., a corporation,

Plaintiff,

v.

ZHENG ZHANG, an individual; and
DOES 1 through 10, inclusive,

Defendants.

Case No.: 5:20-cv-03579-BLF

DECLARATION OF ZHENG ZHANG

I, Zheng Zhang, declare as follows:

1. I am one of the named defendants in this case.
2. I have personal knowledge of all facts stated in this declaration, and if called to testify, I could and would testify competently thereto.
3. I was the CEO of Plaintiff corporation Talece Inc. (“Talece”) from December, 2018 to February, 2020. I have been a minority shareholder of Talece since December 2018 and remains as its minority shareholder.
4. I am a citizen of the People’s Republic of China.
5. I had been in the United States, as an international student, from 2014 to 2019.

1 6. I changed from an international student status to a temporary worker H1-B
2 status only in October, 2019.

3 7. I have been in the temporary worker H1-B status since October, 2019.


4 8. I have never applied for permanent residence and concurrently do not intent
5 to do so.

6 9. I believe Plaintiff corporation Talece could become a foreign corporation by
7 relocating to the state of New York. I believe Mr. Ming Zhang, who is the majority
8 shareholder of Talece, has closer personal and business ties to the State of New York.

9 10. Mr. Ming Zhang resides and is domiciled in China; Mr. Ming Zhang speaks
10 little English. I believe Mr. Ming Zhang thus has neither intention, nor competency to
11 conduct business in the United States.

12 I declare under penalty of perjury under the laws of the United States of America that
13 the foregoing is true and correct, and that this declaration was executed at San Jose, California,
14 on July 27, 2020.

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Zheng Zhang